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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MUNOZ, Defendant and Appellant.	A143251 (Contra Costa County Super. Ct. No. 5-132185-0)

Appellant Jose Munoz appeals from a judgment sentencing him to prison after a jury convicted him of lewd conduct with a child under 14 and determined the crime involved substantial sexual conduct. (Pen. Code, §§ 288, subd. (a), 1203.066, subd. (a)(8).)[1] He contends the judgment must be reversed because he elected not to call several character witnesses after the trial court indicated it would allow the prosecutor to ask those witnesses whether they had heard of admissions he made that were at odds with his asserted good character. Appellant also argues the trial court erred in ordering him to undergo a test for HIV [human immunodeficiency virus] pursuant to section 1202.1. We remand the case for further proceedings regarding the HIV test but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Jane Doe lived in an apartment in San Pablo with her mother, brother and sister. Appellant, who had dated Jane's mother for several years, lived there as well. The family also had a Chihuahua dog.

[1] Further statutory references are to the Penal Code unless otherwise indicated.

On August 25, 2013, when she was 13 years old, Jane went running with her 18-year-old brother on some nearby trails. She returned to the apartment, spoke to her sister, and then fell asleep on the floor next to a couch in the living room, still wearing her running shorts and shirt. Jane saw her mother and appellant in the kitchen as she was falling asleep; later, Jane's mother lay down next to her on the floor and appellant lay down on a second couch five or six feet away.

Early the next morning, Jane awoke to the sensation of appellant rubbing her vagina over her running shorts. The movement lasted five or six seconds and was "fast" and "downwards and upwards." Appellant, who had moved to the couch right next to Jane, quickly removed his hand and lay down again. Jane asked him, "Did you just touch me?" and appellant responded, "That was the dog." Jane saw the dog in the kitchen about 20 feet away. She started to cry. Appellant gave her $5 and told her to forget about it. He had never touched her inappropriately during the nine or ten years she had known him.

Still crying and upset, Jane went into her brother's bedroom and told him she had awakened to appellant touching her vaginal area. Jane seemed ashamed and didn't know what to do. Appellant came into the bedroom about 20 minutes later and offered to give Jane's brother some work, as he sometimes did. Appellant seemed very nervous and told Jane's brother nothing had happened. Appellant also said the dog had jumped on Jane and it wasn't him.

Jane's mother had left the apartment to get coffee for appellant. When she returned, Jane started to cry harder and told her what had happened. Jane went to school that day and called the police later that night.

Appellant spoke to police after being advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436.[2] Asked if he knew why he was in custody, appellant said

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[2] The interview was conducted in appellant's native language of Spanish, with Detective Daniel Wiegers asking the questions in English and Officer Lluvia Lopez, who was bilingual in English and Spanish, translating the questions and responses. In a related petition for habeas corpus, appellant argues the English translation of the

he was there because of "[a] mistake I made, but it was from—from joking around, but that doesn't mean it was okay." He said the type of joke he performed was inappropriate, because he brushed up against Jane Doe in a way he knew was wrong. Appellant acknowledged touching Jane's vagina and commented it was not appropriate for her to wear such small shorts because she was becoming a lady and she was going to attract "bad influences" from him as a man and from other people. He maintained what he did was a "joke," but admitted he was acting on a sexual impulse and said in English he was "thinking dirty." Appellant explained he just figured he should do it because Jane was so close, and he told police she looked like she was 15 instead of 13. Appellant denied he was trying to wake her up to go to school. He felt remorse because he was "losing a wife."

Based on the foregoing evidence, the jury convicted appellant of the single count of lewd conduct charged in the information. (§ 288, subd. (a).) It also found true an allegation he had engaged in substantial sexual conduct, making him ineligible for probation. (§ 1203.066, subd. (a)(8).)[3] At sentencing, the court stated it found the circumstances in aggravation and mitigation to be "close to being even," and appellant waived his presentence credits in exchange for the imposition of the three-year lower term. The court also imposed various fines, fees and assessments, and made ancillary orders including one requiring appellant to submit to HIV testing under section 1202.1

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interview was inaccurate, and the prosecution's failure to provide him with a side-by-side English/Spanish version of the transcript until the first day of trial deprived of him of his right to confrontation, to effective assistance of counsel, and to pretrial discovery of exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83. We have denied that petition by separate order. (*In re Jose Efrain Munoz*, A145934.) We also deny appellant's request for judicial notice, filed August 12, 2015.

[3] "Substantial sexual conduct" is defined to include "masturbation of either the victim or the offender." (§ 1203.066, subd. (b).) The jury was given CALCRIM No. 3250, which defined "masturbation" to encompass "any touching or contact with the genitals, however slight, of the child or the perpetrator, including over the clothes, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or child." (See *People v. Chambless* (1999) 74 Cal.App.4th 773, 783.)

DISCUSSION

I. *Impeachment of Character Witnesses*

Appellant contends the trial court abused its discretion, deprived him of his right to present a defense, and denied him a fair trial when it ruled the prosecution could cross-examine defense character witnesses about statements he made to a court appointed psychologist. These statements included an admission by appellant that he might have been sexually aroused when he touched Jane Doe's vagina. We conclude any error was harmless.

A. Factual Background

At the suggestion of the prosecution, appellant submitted to a psychological evaluation under section 288.1 before the trial began.[4] The purpose of the examination was to determine whether appellant would be offered a plea agreement with a probationary term. Appellant was evaluated by Charles A. Flinton, Ph.D., who concluded appellant did not meet the criteria for pedophilia or psychopathy and presented a low risk of reoffending. Included in the report was appellant's version of the incident with Jane Doe, in which he claimed his hand rubbed against Jane's vagina when he reached over to move the family dog from between her legs. Appellant told Dr. Flinton he was confused as to why he touched Jane's vagina, and said it was "a bit of a joke." Asked whether he was sexually aroused by touching Jane, appellant said "maybe." The prosecution did not extend an offer of probation.

During the trial, defense counsel indicated he intended to call witnesses who would offer opinion or reputation evidence of appellant's good character to prove he was not the sort of person who would molest a child. (See Evid. Code, §§ 1100, 1102, subd. (a); *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309 (*McAlpin*).) The witnesses were the

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[4] Section 288.1 states, "Any person convicted of committing any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person."

nieces of appellant and a sister of Jane Doe, and their anticipated testimony would be that based on their own interactions with appellant, they did not believe he had lustful or sexual desires for children.

The prosecutor advised the court he intended to ask each character witness whether she had heard about statements made by appellant during the section 288.1 evaluation, and whether those statements would change her opinion. (See *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954; *People v. Hurd* (1970) 5 Cal.App.3d 865, 879, 880.) Defense counsel argued such impeachment would be improper and the statements memorialized in the section 288.1 report were inadmissible because they were made in the context of plea negotiations. (§ 1192.4; Evid. Code, § 1153; *People v. Scheller* (2006) 136 Cal.App.4th 1143, 1148; *People v. Tanner* (1975) 45 Cal.App.3d 345, 351–354.)

The court ruled the statements could be used for impeachment purposes, subject to a jury instruction they could not be considered for their truth and were admitted for the limited purpose of determining the weight of the character witnesses' testimony. (See *People v. Crow* (1994) 28 Cal.App.4th 440, 450–451 [statements made during plea negotiations admissible to impeach defendant's testimony, though not admissible during case-in-chief].) The court also determined the statements were not more prejudicial than probative under Evidence Code section 352, because there was no issue as to whether appellant had actually made the statements and no danger of "unfounded innuendo being placed before the jury . . . ." Defense counsel advised the court that in light of its ruling, he would not present the testimony of the character witnesses. The defense rested without calling any witnesses to the stand, and no evidence of appellant's statements during the section 288.1 examination was presented.

B. Analysis

Appellant contends the trial court's ruling was erroneous because it would have permitted the prosecution to place the otherwise inadmissible statements to Dr. Flinton before the jury. He acknowledges a character witness may be asked about prior *conduct* by the defendant that is inconsistent with the opinion offered or the reputation described,

but argues a defendant's *admissions* are qualitatively different because they go beyond impeachment and touch directly on the ultimate issue of the case. Appellant also argues the statements to Dr. Flinton were inadmissible because they were made during a section 288.1 examination whose purpose was to evaluate the suitability of a plea agreement.

We need not decide whether the trial court abused its discretion when it ruled the prosecution could question the character witnesses about appellant's statements to Dr. Flinton. Even if it should have disallowed the proposed line of cross-examination, the error was harmless.

A criminal judgment is presumed correct, and a defendant bears the burden of affirmatively demonstrating prejudicial error. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) In this case, we apply the standard of state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836, and consider whether it was reasonably probable the jury would have reached a more favorable verdict if the character witnesses had testified and had not been impeached by the challenged statements. (See *McAlpin, supra,* 53 Cal.4th at p. 1311, [applying *Watson* standard to erroneous exclusion of defense character evidence].)

Appellant cannot carry his burden of establishing prejudice. His character witnesses did not testify, and we have no way to assess the effect their testimony would have had in light of all the other evidence. In an analogous context, a defendant who wishes to preserve an objection to an in limine ruling permitting his impeachment by a prior conviction must take the witness stand and actually suffer such impeachment. (*Luce v. United States* (1984) 469 U.S. 38, 42; *People v. Sims* (1993) 5 Cal.4th 405, 454; *People v. Collins* (1986) 42 Cal.3d 378, 385 (*Collins*).) While it is unnecessary to determine whether this rule should be extended to all defense witnesses in a criminal trial who are not called to the stand after an unfavorable in limine ruling (see *People v. Ayala* (2000) 23 Cal.4th 225, 272–273 [declining to resolve this " 'close and difficult' " question]), one of the reasons for the rule is that when the defendant does not testify, "the reviewing court cannot intelligently weigh the prejudicial effect of that error." (*Collins,* at p. 384.)

To the extent we can make assumptions about the character witnesses' likely testimony, the prejudicial effect of allowing the prosecution to cross-examine them using appellant's statements to Dr. Flinton would have been completely negated by the introduction of similar statements made by appellant during his police interrogation. (See *People v. Valdez* (2004) 32 Cal.4th 73, 120 [no prejudice requiring severance of count when evidence of other crime would come in anyway during trial of the other count].) The jury already knew appellant had told police the touching was a "joke," admitted his conduct was wrong, acknowledged he acted on a "sexual response," and said he had been "thinking dirty." In the face of the evidence of appellant's admissions to police, which were more damaging because they were introduced for their truth as party admissions (Evid. Code, § 1220), the court's ruling allowing the use of the statements to Dr. Flinton subject to a limiting instruction was not prejudicial.

Finally, the prosecution's evidence was strong. As the Attorney General notes, there were no contradictions or admitted untruths in Jane Doe's testimony and no motive for her to fabricate the charge. Her testimony was corroborated by her brother's. While appellant did not testify at trial, he admitted to police that he touched Jane's vagina, even as he blamed the family dog and attempted to minimize his guilt by claiming the touching was a joke or a mistake. Against this backdrop, it is difficult to see how the result of this trial would have been changed by evidence that some family members did not believe appellant was a person who would commit a lewd act with a child. Jane Doe testified she herself was shocked by the touching because she had known appellant for years and he had not touched her inappropriately before.

II. *HIV Test*

Section 1202.1 requires a trial court to order HIV testing of persons convicted of enumerated sexual offenses, including lewd conduct with a child in violation of section 288, subdivision (a), "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (§ 1202.1, subds. (a), (e)(6)(A)(iii).) If the trial court orders testing without articulating its reasons on the record, a reviewing court must presume an

implied finding of probable cause. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114–1115.) However, the order may be sustained only if there is sufficient evidence to support a finding of probable cause. (*People v. Butler* (2003) 31 Cal.4th 1119, 1127 (*Butler*).) Appellant contends, and the People agree, there is no substantial evidence in the record of this case to support the requisite finding, implied or otherwise.

When, as here, no objection was lodged below and the record contains no discussion of the HIV testing requirement, the appropriate remedy is a remand. "Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. . . '[I]n the absence of an objection at trial, the prosecutor had no notice that such evidence would be needed to overcome a defense objection.' [Citation.] Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order. Accordingly, . . . it is appropriate to remand the matter for further proceedings at the election of the prosecution. [Citation.]" (*Butler, supra,* 31 Cal.4th at p. 1129.)

DISPOSITION

The case is remanded to the trial court. If the prosecution so elects within 30 days after the issuance of the remittitur, the court will hold a hearing at which evidence may be offered regarding probable cause supporting an HIV testing order. If the prosecution does not so elect, the court shall order the HIV testing order stricken. The judgment is affirmed in all other respects.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.